No. 09-1343

IN THE

Supreme Court of the United States

J. McINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *et ux.*,

Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a state may, consistent with due process, exercise *in personam* jurisdiction over a foreign manufacturer pursuant to a stream-of-commerce theory solely because the manufacturer sells its products to a U.S.-based distributor that it "should know" targets a nationwide market and the product is purchased by a forum state consumer.

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INTEREST OF THE *AMICI CURIAE*

The Organization for International Investment and the Association of International Automobile Manufacturers Inc. are business associations that have substantial common interests in ensuring stable and predictable legal regimes affecting interstate and foreign commerce, and in promoting policies that secure for their members and this nation the benefits of an open national and global economy.[1]

The Organization for International Investment (OFII) is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government. OFII is charged with promoting the legal and policy interests of its members, who have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations across this country, as well as many others. Its members contribute substantially to the U.S. economy. The cumulative value of foreign direct investment in the United States in 2009 was approximately $2.3

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[1] No party's counsel authored this brief (in whole or in part), and no person other than *amici*, their members, or their counsel contributed monetarily to this brief's preparation or submission. Jeffrey T. Green, a partner at Sidley Austin LLP, served as additional counsel for Petitioner through the Northwestern University School of Law Supreme Court Practicum. Mr. Green did not author or contribute in any way to the preparation of this brief. *Amici* are advised that, by virtue of blanket consent letters filed on October 15 and 13, 2010, by Petitioner and Respondents, respectively, all parties consent to the filing of this brief.

trillion. James K. Jackson, Congressional Research Serv., *Foreign Direct Investment in the United States: An Economic Analysis* 1 (July 28, 2010), *available at* http://www.fas.org/sgp/crs/misc/RS21857.pdf. Direct investment capital inflows in 2008 totaled approximately $325 billion. *Id.* Most of that amount, roughly $260 billion, represents new investments. *Id.* at 4. OFII's goal is to make the United States an increasingly attractive location for companies headquartered outside the United States to conduct more business and employ more Americans within our borders.

The Association of International Automobile Manufacturers Inc. (AIAM) is a not-for-profit trade association that represents international motor vehicle manufacturers and distributors, certain original equipment suppliers, and other automotive-related trade associations. AIAM's mission is to protect and promote the unique interests of international automakers in the United States. It is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety, fuel economy and the environment. AIAM's members account for 40 percent of all passenger cars and light trucks sold annually in the United States. Nationwide, international automakers have invested over $43 billion in U.S.-based production facilities, have a combined domestic production capacity of 4.2 million vehicles, directly employ over 80,000 Americans, and generate almost 600,000 U.S. jobs through dealerships and suppliers nationwide. AIAM's automobile manufacturer members include: American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America,

Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi Motors North America, Inc., Nissan North America, Inc. Peugeot Motors of America, Subaru of America Inc. and Toyota Motor North America, Inc.

Automobile manufacturing today is an international business. AIAM's members are subsidiaries of global companies that design, manufacture, distribute and sell passenger vehicles and light-duty trucks all over the world. The legal issues addressed in this case are of major importance to AIAM's member companies, all of whom have considerable experience litigating in state and federal courts in the United States, especially cases involving product liability disputes.

SUMMARY OF ARGUMENT

The decision below represents a fundamental departure from bedrock legal principles this Court has defined and preserved over the course of many decades. First, this Court has time and again reaffirmed that a state court's exercise of personal jurisdiction over a defendant requires that the defendant itself have engaged in purposeful conduct directed at the particular forum state. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985); *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). Second, both in the context of personal jurisdiction and more generally, this Court has emphasized that courts must respect corporate distinctions. *United States* v. *Bestfoods*, 524 U.S. 51, 61–62 (1998); *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984); *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925). Thus, each defendant's contacts with the forum state must be assessed individually and the actions of one legal entity may not

automatically be attributed to another. *Keeton*, 465 U.S. at 781 n.13.

In the decision below, the New Jersey Supreme Court disregards these requirements in multiple ways, which do particular harm in the context of international commerce. First, ignoring the difference between *a state* and *the United States*, the New Jersey Supreme Court discards the requirement that a defendant have at least some minimum contacts with the forum state in particular. Second, ignoring the requirement for purposeful contacts, the court finds jurisdiction based on what it believes a foreign manufacturer "should know" about the distribution scheme of an independent U.S. distributor. Given the likely prevalence of national distribution schemes, the court creates a new requirement that companies affirmatively avoid particular states, regardless of whether they have any contacts there in the first place. Finally, implicit in the court's discussion of the relationship between the defendant and its distributor is the court's reliance on the latter's conduct to find jurisdiction over the defendant, in disregard of their corporate independence and arms-length business relationship.

Based on their members' experience as companies within multinational corporate groups engaged in significant international commerce, *amici* can attest that these legal errors present serious real-world concerns for the conduct of their business and risk material negative consequences for the flow of international commerce. Indeed, the United States Department of Commerce has reported on the concerns of international investors regarding the fairness and predictability of the U.S. legal environment. See Charles G. Schott, U.S. Dep't of Commerce, The U.S. Litigation Environment and

Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty 5–6 (Oct. 2008), *available at* http://www.investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf (*"Department of Commerce Report"*) (reporting results of multiple studies). Considering the large role that foreign direct investment plays in the U.S. economy and the many contributions that companies such as *amici*'s members make in terms of domestic employment and investment, increasing legal uncertainty risks undermining the continued vitality of the United States as a highly attractive destination for foreign investment.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT'S DEPARTURE FROM THIS COURT'S PRECEDENT REPRESENTS A SIGNIFICANT INTERFERENCE WITH THE CONDUCT OF INTERNATIONAL COMMERCE AND HARMS U.S. EFFORTS TO ATTRACT FOREIGN INVESTMENT.

A. The New Jersey Supreme Court Abandoned The "Constitutional Touchstone" That Requires A Defendant Purposefully To Establish Minimum Contacts In The Forum State.

The decision below devotes significant attention to purported policy interests of New Jersey in light of globalization and international commerce. But the New Jersey Supreme Court forgets the clear mandate of this Court: "Notwithstanding these considerations [of state interest] the constitutional touchstone remains whether the defendant purposefully

established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This constitutional bedrock focuses on two key elements: the purposeful actions of the defendant itself, and the nature of the defendant's contacts with the forum state in particular. The New Jersey Supreme Court discards both elements and therefore its judgment should be reversed.

Because the Due Process Clause protects individual liberty against state power, *Burger King*, 471 U.S. at 471-72, the focus of a court's personal jurisdiction analysis must be on the actions *of the defendant* that are purposefully directed toward the forum state. The New Jersey Supreme Court identified not a single action by the defendant J. McIntyre purposefully directed at New Jersey. Instead, the court discussed what J. McIntyre "should have" known based on the purportedly national distribution scheme employed by its independent distributor, an unrelated corporate entity and a separate defendant in the action.[2] But a defendant's amenability to suit in New Jersey must be based on its own actions, not the actions of legally distinct corporate entities, whether affiliated or not. Due process requires that each defendant's actions be "assessed individually" and that each have the requisite purposeful minimum contacts. *Keeton*, 465 U.S. at 781 n.13; see Section II *infra*.

Equally problematic is the New Jersey Supreme Court's attempt to erase the borders that distinguish

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[2] As the New Jersey Supreme Court expressly noted, "J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled, without any common ownership." Pet. App. 7a.

the State of New Jersey from the United States as a whole, effectively eliminating the sovereign bounds that our federal-state system imposes on each individual state. Contrary to the view of the New Jersey Supreme Court, state lines are not meaningless or outdated. This Court has held that personal jurisdiction requires minimum contacts with the *forum state*, not simply any state in the nation. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). As this Court emphasized in *World-Wide Volkswagen*, "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* While this Court has expanded the limits of personal jurisdiction from strict territorial presence to minimum contacts with the forum state, it has never accepted the proposition that a state could exercise power over a defendant who had no "contacts, ties, or relations" with that state. *Id.* (quoting *Int'l Shoe*, 326 U.S. at 319). There is no basis for a state to have jurisdiction over a defendant based on the latter's contacts with other states in the nation. Moreover, in the context of a non-U.S. defendant, the need to ensure that states adhere to appropriate limits on their jurisdictional assertions carries even greater urgency, given the importance of comity presumptions against the extraterritorial reach of U.S. authority and the preeminent federal (rather than state) role in

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[1] The clear inference to be drawn from the plurality's analysis in *Asahi*—that state court jurisdiction must be based on contacts with that specific state, otherwise there would have been no reason to contrast that situation with the undisputed question of whether a federal court could exercise jurisdiction over a foreign defendant based on national contacts. *See Asahi Metal Indus.* v. *Superior Ct.*, 480 U.S. 102, 105 n.* (1987) (plurality opinion).

managing the country's relations with other nations. See, *e.g.*, *Japan Line, Ltd.* v. *Cnty. of L.A.*, 441 U.S. 434, 448 (1979); *Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968); *McCulloch* v. *Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963) (recognizing that perceived affronts to foreign sovereign interests could "invite retaliatory action from other nations"); Gary B. Born, *Reflections on Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 30–31 (1987); see also Section III *infra*.

In an attempt to create some connection to New Jersey, the court below adopts what this Court has explicitly rejected—allowing mere foreseeability to serve as a basis for personal jurisdiction. "[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295. Throughout its opinion, the New Jersey Supreme Court speaks in terms of what the defendant "should know" about where its products might end up, see Pet. App. 22a, 35a, 37a, 39a, 40a, rather than pointing to affirmative actions the defendant purposefully took to market or direct its products to New Jersey (that is because there were none). And, the only reason the court below offers for why the defendant "should know" its products might end up in New Jersey is the "national distribution scheme" purportedly used by its independent distributor.

The court hints that policy concerns about foreign manufacturers peddling defective products through distributors justify its sweeping rule. See, *e.g.*, Pet. App. 22a, 34a, 36a. Rejecting similar reasoning, this Court has explained that "[a]lthough it has been argued that foreseeability of causing *injury* in another State should be sufficient to establish such

contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a 'sufficient benchmark' for exercising personal jurisdiction." *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

In practical effect, the New Jersey Supreme Court's rule would subject a foreign corporation to the jurisdiction of any state for simply accessing the U.S. market in any respect. At the very least, the rule creates significant and disturbing uncertainty and unpredictability for multinational corporations making fundamental decisions about where, whether, and how to do business. The New Jersey Supreme Court's decision improperly ignores this Court's instruction that due process allows entities to structure their operations to predict their amenability to suit. *World-Wide Volkswagen*, 444 U.S. at 297.

B. Increasing Legal Uncertainty Damages U.S. Efforts To Attract Foreign Direct Investment.

The United States is the largest recipient of foreign direct investment in the world.[4] United Nations Conference on Trade & Dev., *World Investment Report 2010* 4 (June 2010). This investment from

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[4] Foreign direct investment "occurs when non-resident firms or individuals commit their capital to a country for the long-term by purchasing a significant interest in existing domestic companies or assets, or creating new domestic legal entities or assets." Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 5 (Aug. 2007), *available at* http://www.instituteforlegalreform.com/component/docman/doc_download/230-issue-brief-lawsuits.html

abroad is an essential element of the United States economy, creating millions of jobs and proving needed financing for growth. One major explanation for this success is the rule of law and the efforts of all three branches of government to develop a sufficiently stable legal regime to encourage investment.

The U.S. Department of Commerce has reported, however, that the unpredictability and cost of litigation are among the top concerns of foreign businesses considering both whether to invest and whether to continue to invest in the United States. *Department of Commerce Report* at 5-6 (reporting results of multiple studies). For instance, a study jointly commissioned by New York City Mayor Michael Bloomberg and U.S. Senator Charles Schumer found concerns about the United States legal environment among business leaders in the financial services sector. *Sustaining New York's and the U.S.'s Global Financial Services Leadership* 15-16 (Jan. 2007), available at http://www.nyc.gov/html/om/pdf/ny_report_final.pdf ("*Bloomberg-Schumer Report*"). According to the *Bloomberg-Schumer Report*, the business leaders surveyed ranked a "fair and predictable legal environment" as the second most important factor in assessing potential countries in which to do business. *Id.* These business leaders believed the United States was at a disadvantage relative to the United Kingdom, for example, in part because of "concerns that the US legal environment is less fair and less predictable than the UK environment." *Id.*

Part of the unpredictability in the U.S. legal environment comes from our federal system, with its multitude of potential legal regimes that a company may encounter. In the *Department of Commerce Report*, the potential application of federal and state

law was noted as a "distinctive feature of the U.S. legal system" that an "international investor might find . . . unfamiliar." *Id.* at 3–4 & Box 1. Yet at that time, the Department was at least able to state with confidence that "[e]ven with 50 States (plus the District of Columbia), it is typically clear *which State legal systems are relevant*." *Id.* at 4 (emphasis added). If the New Jersey rule is upheld, the Department could no longer offer potential foreign investors even this modest assurance about the predictability of the U.S. legal environment because plaintiffs could always claim that companies selling products to a U.S. distributor "should know" their products might be distributed nationally and hale them into court in any state in which those products land. Indeed, the U.S. legal system would no longer be one in which businesses can "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

A recent member survey by *amicus* OFII of 65 Chief Executive Officers of U.S. subsidiaries of foreign companies revealed that the costs associated with the United States legal system are seen as a drawback to investing here. OFII, *The Insourcing Survey, A CEO-Level Survey of U.S. Subsidiaries of Foreign Companies* 8 (April 2008), *available at* http://www.ofii.org/docs/ceo2008.pdf. A study conducted by Robert Litan, commissioned by the U.S. Chamber of Commerce, found similar results. Robert E. Litan, U.S. Chamber Inst. for Legal Reform, *Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System* 5 (August 2007), *available at* http://www.instituteforlegalreform.com/component/

ilr_docs/29/issue/LAI/STU.html.[5] In particular, Litan noted that "the multiplicity of governing jurisdictions creates both complexity and uncertainty" and reported that some of those surveyed "believe[d] the complexity and uncertainty stemming from [the U.S.] system may be worse than elsewhere." *Id.* at 16–17. If this fear of uncertainty existed when companies thought they could predict their amenability to suit based on their purposeful contacts with a given state, it will be orders of magnitude worse under New Jersey's nationwide "should have known" test, which subjects a company that accesses the U.S. market in any respect to a potential lawsuit in any state where its products end up.

C. The New Jersey Supreme Court Suggests That A Focus On A "Nationwide Distribution System" Limits The Scope Of Its Rule, But In Practical Operation Its Jurisdictional Test Is Limitless.

The nature of today's international commerce means that any company that sells a product into a given market "should know" of the theoretical possibility that the product might be re-sold anywhere within that market. A firm operating in international commerce may or may not seek out a market in a particular country (a manufacturer can grant regional or even global distribution rights); even if it plans or knows its goods will be sold in a particular country in general, it typically does not

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[5] Litan conducted interviews with representatives of several foreign companies that have invested or established operations in the United States, as well as with attorneys who have counseled foreign companies regarding U.S. investment decisions. *See id.* at 11–12.

affirmatively exclude the possibility of sales within a sub-part of that market. Moreover, consumers can now research and seek out products, even if those products are not marketed within their state. Thus, once a company sells products anywhere within the United States, they are in practical effect available everywhere through the unilateral action of others.

Yet, modern commerce and globalization cannot be used as an excuse by states to erase the restraints of due process protecting defendants or limits on the power of state judicial systems. The New Jersey Supreme Court argues that the growth in international business activity justifies its assertion over a foreign defendant with no actual "contacts, ties, or relations" with New Jersey. *Int'l Shoe*, 326 U.S. at 319. However, as this Court has reminded state courts in the past, "technological progress" and the "increased flow of commerce" have allowed for a more "flexible standard," but "it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." *Hanson* v. *Denckla*, 357 U.S. 235, 250–51 (1958). To be sure, the global economy has changed dramatically over the past 50 years, but the constitutional protections and limitations on state power have not. Moreover, there is no reason for this Court to modify its standards when Congress, which has plenary authority over international commerce, has not felt the need to legislate on the purported concerns about the global economy that apparently motivated the decision of the court below.

The application by the New Jersey Supreme Court of its new rule makes clear how limitless its standard actually is. The court below relied on precious few actual facts to argue that defendant J. McIntyre targeted a national market that included New Jersey.

First, the court simply asserted that the defendant "targeted the United States" and used an exclusive U.S. distributor. Pet. App. 38a–39a. It then found that the defendant "should have known" its independent distributor employed a nationwide distribution system because J. McIntyre officials attended trade shows in "various American cities." *Id.* at 39a. After the court concluded that it was "clear that those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events," it decided that the mere attendance by a J. McIntyre official at a few such trade shows constituted "calculated efforts to penetrate the overall American market." *Id.* Thus, even though the court acknowledged that "J. McIntyre may not have had access to McIntyre America's customer list," it determined that J. McIntyre "knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held." *Id.* This is the full extent of the evidence upon which the New Jersey Supreme Court relied to hale J. McIntyre into court in New Jersey.

Simply put, selling products to an independent distributor in the United States and attending a few trade shows do not represent the "minimum contacts" with New Jersey required "such that maintenance of the suit 'does not offend "traditional notions of fair play and substantial justice."'" *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *Int'l Shoe*, 326 U.S. at 316). If it were otherwise, foreign companies would face an unpredictable exposure to potential liability that could only create the most serious cause for concern when deciding whether to do any business in the United States at all. By contrast, insisting

that due process can only be satisfied when the defendant has purposefully availed itself of the benefits of the forum state provides at least enough predictability to allow foreign businesses to make sensible judgments based on calculable risk. The Constitution requires no less.

D. The Decision Below Places An Impractical And Unworkable Obligation On Companies To Take Affirmative Steps To Avoid Particular States.

Purporting to provide foreign companies some control over their amenability to suit in New Jersey, the court below tacked on an "escape clause" to its otherwise limitless jurisdictional test. According to the New Jersey Supreme Court, "[a] manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is *not* marketing its products in this State." Pet. App. 36a (emphasis added).

The New Jersey Supreme Court's "affirmative avoidance" obligation turns this Court's well-established rule on its head. This Court has always looked to a defendant's *purposeful* conduct directed at, or efforts to do business in, a particular state. *Burger King*, 471 U.S. at 472–75. The decision below would, in practice, impose jurisdiction by default anywhere a company's products end up and require a foreign company to take affirmative steps to avoid a particular state, even if it has no contacts there at all. Yet, this Court has rejected the proposition that "[e]very seller of chattels . . . appoint[s] the chattel his agent for service of process." *World-Wide Volkswagen*, 444 U.S. at 296.

Not only is this rule unworkable from a practical perspective, it is also undesirable. The rule would

create an incentive for companies to adopt extraordinary measures in the hope of blocking commerce with particular states, increasing costs to consumers there and complicating their access to the global marketplace. And, given the practical difficulties of affirmatively avoiding individual states, such a rule poses a very clear risk that some foreign producers will choose simply to abandon the United States market altogether.

II. THE NEW JERSEY SUPREME COURT'S DISREGARD OF CORPORATE DISTINCTIONS WILL NEGATIVELY AFFECT FOREIGN INVESTMENT IN THE UNITED STATES.

In the decision below, the New Jersey Supreme Court appears to have found jurisdiction largely based on the actions of a separate distributor. While it purported to find the necessary contacts based on J. McIntyre's decision to use a distributor and its supposed awareness of a national distribution scheme, it could point to nothing that J. McIntyre actually did that was directed toward New Jersey itself.

Perhaps aware of the feeble nature of this showing, the New Jersey Supreme Court then engaged in a vague discussion of the relationship between J. McIntyre and its distributor. See Pet. App. 40a. While never saying it outright, the court appeared to rely on this arms-length relationship between separate entities to establish jurisdiction over the defendant. *Id.* at 40a–41a (stating that J. McIntyre "should have known that *its* distribution scheme" reached New Jersey, even though distribution was the responsibility of an independent entity). At the very least, the court seems to have offered the discussion of the corporate interactions to bolster

implicitly its claim that asserting of jurisdiction over J. McIntyre would not "offend traditional notions of fair play and substantial justice." *Id.* at 11a. It is not surprising that the court did not own up to its blurring of corporate distinctions and unsupported attribution to find jurisdiction over the defendant. Given this Court's clear instructions regarding the need for a separate due process analysis as to *each* defendant and the respect for corporate distinctions, such an admission by the New Jersey Supreme Court would reveal error embedded in error.

A. The Actions Of Separate Corporate Entities Are Not Attributable To Each Other.

The "respect for corporate distinctions" is a "bedrock principle" of law "deeply ingrained in our economic and legal systems." *Bestfoods*, 524 U.S. at 61–62; *Anderson* v. *Abbott*, 321 U.S. 349, 362 (1944) ("Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises launched, and huge sums of capital attracted."). This fundamental principle of corporate law provides that "a corporation will not be held liable for the acts of its subsidiaries or other affiliated corporations." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43 (2007), much less for the actions of entirely unrelated corporate entities.

The rule of corporate separateness applies equally to the issue of personal jurisdiction. *Keeton*, 465 U.S.at 781 n.13; *Cannon Mfg. Co.*, 267 U.S. at 335–37; see also 18 Fletcher, *supra*, § 8640.50 (noting that "where the subsidiary is operated as a distinct corporation, the subsidiary's contacts with the forum cannot be imputed to the parent for jurisdictional purposes"); John A. Swain & Edwin E. Aguilar,

Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon *Doctrine*, 84 B.U. L. Rev. 145 (2004) (finding that *Cannon* is followed by a majority of courts referencing it).

Based on this "bedrock principle," this Court has long refused to ignore legitimate corporate distinctions in analyzing personal jurisdiction. See *Keeton*, 465 U.S. at 781 n.13; *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980); *Cannon Mfg Co.*, 267 U.S. at 335–37. As this Court has emphasized, "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually." *Keeton*, 465 U.S. at 781 n.13 (citing *Consol. Textile Co.* v. *Gregory*, 289 U.S. 85, 88 (1933); *Peterson* v. *Chicago, R.I. & Pac. R.R.*, 205 U. S. 364, 391 (1907)); *Rush*, 444 U.S. at 332 ("The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction."); *Phila. & Reading Ry.* v. *McKibbin*, 243 U.S. 264, 268 (1917) ("Nor would the fact . . . that 'subsidiary companies' did business within the state, warrant a finding that the defendant did business there."). The application of the doctrine of corporate separateness to questions of personal jurisdiction only makes sense. If a parent corporation cannot be held liable based on the acts of its subsidiary, its jurisdictional fate should also not depend on the actions of its subsidiary. Similar interests are at stake in both circumstances: the need for predictability in structuring business arrangements and investment decisions.

Thus, in a case where a foreign manufacturer's product is sold by a U.S. distributor, the court must evaluate "individually" each defendant's contacts

with the forum state. This is true where the distributor is completely independent, as in this case, and is equally the rule where the distributor may be a subsidiary or other affiliate of the foreign manufacturer.

To the extent there are concerns about potential misuse of the corporate form, this Court has made clear that "there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf." *Bestfoods*, 524 U.S. at 62. But in the absence of any suggestion, much less a finding, that the corporate form has been misused, a court should not ignore the "respect for corporate distinctions" by attributing the acts of one corporate entity to another for purposes of finding the requisite jurisdictional contacts.

While this Court has noted that "the parties' relationships with each other may be significant in evaluating their ties to the forum," *Rush*, 444 U.S. at 332, it has always been careful to hold fast to that "constitutional touchstone" by emphasizing that "[t]he requirements of *International Shoe*, however, ***must be met as to each defendant*** over whom a state court exercises jurisdiction." *Id.* (emphasis added).

This Court has expressly recognized that due process protects the right of defendant corporations to structure their "primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297. Providing this "degree of predictability to the legal system" is critical to

maintaining a legal environment that continues to attract substantial foreign investment. *Id.*

B. Under The New Jersey Supreme Court's Rule, Foreign Companies Would Face Significantly Increased Risk From Having Subsidiaries In The United States.

Companies operating in the global marketplace—whether based in the United States or abroad—utilize a wide variety of corporate structures and business arrangements to bring their products from the place of manufacturing to the end market. Companies may establish subsidiaries or affiliates to serve different countries or regions or may sell their products to independent distributors in a country. These arrangements are not nefarious schemes to be battled by state courts; they are legitimate forms of carrying on beneficial international and interstate commerce. Moreover, many of these arrangements bring significant benefits to the U.S. economy in the form of foreign direct investment. In addition to being wrong as a legal matter, the decision below creates a number of negative consequences.

Under the New Jersey Supreme Court's rule, any foreign manufacturer parent could potentially be subject to jurisdiction in New Jersey and other states solely because it has a U.S. subsidiary that sells products in the U.S. market. After all, the court's rule allowed the assertion of jurisdiction over a foreign manufacturer based on its use of a completely independent U.S. distributor and a purported awareness of a national distribution scheme. If a court may assert jurisdiction on so slender a reed, foreign companies will have legitimate cause for concern in every state when considering setting up operations or subsidiary companies anywhere in the

United States. Based on the New Jersey Supreme Court's reasoning, any foreign producer could be said to be targeting "State X" because it placed a product into the stream of commerce and "should have known" that its distributor sold products to the U.S. market, which obviously includes "State X."

The U.S. subsidiaries of foreign companies provide significant benefits to the U.S. economy, which this decision risks by increasing legal uncertainty and creating legitimate fear of the U.S. legal system. The U.S. subsidiaries of foreign companies provide jobs to 5.5 million Americans and support an annual payroll of over $400 billion. OFII, Insourcing Facts, *available at* http://www.ofii.org/resources/insourcing-facts.html (last visited Nov. 17, 2010) ("Insourcing Facts"). Not only do foreign-owned businesses employ millions of Americans, they also indirectly support an additional 16 million jobs because they purchase 80 percent of their inputs from U.S. businesses. U.S. Dept. of Treasury, Fact Sheet: An Open Economy Is Vital to United States Prosperity (May 10, 2007), *available at* http://www.treas.gov/press/releases/hp395.htm. What is more, the jobs provided by these U.S. subsidiaries tend to be higher paying, offering an average compensation per worker of $73,121, which is 31.7 percent higher than compensation at all U.S. companies. See Insourcing Facts.

These U.S. subsidiaries also make significant investment expenditures here, spending almost $40 billion on research and development and $183 billion on plant construction and new equipment. See Insourcing Facts. In addition, they constitute a significant portion of U.S. corporate tax collections, bringing in almost $53 billion in 2007. Internal Revenue Serv., *Historical Summary: Foreign-Controlled Domestic Corporations as a Percentage of*

All Corporations, Selected Items for Selected Tax Years, 1971-2007, available at http://www.irs.gov/taxstats/bustaxstats/article/0,,id=96311,00.html.[9]

As discussed above, see Section I.B. *supra*, a country's legal environment represents one of the primary considerations when companies consider foreign investment opportunities. While the overall quality and fairness of the United States legal environment is widely recognized, foreign businesses investing here have expressed concern about the cost of litigation in the United States and the fairness and predictability of the legal environment. See *Department of Commerce Report* at 5–6. For companies considering whether to establish subsidiaries here or evaluating their continued investments, the New Jersey Supreme Court decision represents a significant blow to both fairness and predictability.

III. THE NEW JERSEY SUPREME COURT'S RULE OVERREACHES ITS SOVEREIGN POWER AND INTERFERES WITH THE CONDUCT OF THE NATION'S FOREIGN RELATIONS.

As Petitioner demonstrates in its brief on the merits, the requirements for personal jurisdiction also derive from the inherent limits of state authority. See, *e.g.*, *Hanson*, 357 U.S. at 251 (holding that the "requirements for personal jurisdiction over nonresidents . . . . are a consequence of territorial limitations on the power of the respective States"). More recently, this Court has strongly reaffirmed the fundamental underlying basis for personal jurisdiction, which is a state or nation's sovereign

[9] Data for tax year 2007 is the most recent available from the IRS.

power over its territory. *Burnham* v. *Super. Ct.*, 495 U.S. 604, 608–09, 618 (1990). This is why, even when expanding the limits of personal jurisdiction to allow jurisdiction over nonresident defendants, this Court has always required the existence of "minimum contacts' between the defendant and the forum State." *World-Wide Volkswagen*, 444 U.S. at 291 (quoting *Int'l Shoe*, 326 U.S. at 316).

Moreover, because the New Jersey Supreme Court's decision burdens non-U.S. entities and international commerce, it presents a special concern. *Asahi Metal Indus. Co.* v. *Super. Ct.*, 480 U.S. 102, 115 (1987). A majority of this Court in *Asahi* concluded that a case involving a non-U.S. defendant calls for special consideration of the interests of other nations "as well as the Federal interest in Government's foreign relations policies." *Id.* The Court instructed that these interests require "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" and cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Id.* (quoting *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

In this case, the New Jersey Supreme Court's failure to adhere to the requirement of "minimum contacts" with the forum state involves more than just a question of individual liberty or interstate federalism, it touches on the proper role of the states vis-à-vis the federal government. The primacy of the federal role in relations with foreign governments and persons pervades the federal system established by the Constitution. See Born, *supra*, 17 Ga. J. Int'l & Comp. L. at 29–31, n.123. And, while this case does not involve direct state regulation of foreign

commerce, the Constitution's express grant of power to Congress to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, embodies the notion that "[f]oreign commerce is pre-eminently a matter of national concern." *Japan Line, Ltd.*, 441 U.S. at 448. As such, "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* (quoting *Bd. of Trustees* v. *United States*, 289 U.S. 48, 59 (1933)). While the grant of the foreign commerce power to Congress does not preclude state courts from exercising jurisdiction over foreign companies, it does call for heightened scrutiny to ensure that states' assertions of jurisdiction stay within their legitimate bounds and are reasonable. *Asahi*, 480 U.S. at 115. It also means that there is a branch of government with ample authority to weigh the competing concerns associated with the expansion of our global economy. That institution is Congress. But, in all events, a state's exercise of jurisdiction over a foreign company with no "contacts, ties, or relations" to that state cannot stand under our Constitutional system. *Int'l Shoe*, 310 U.S. at 319. This Court should reaffirm the fundamental principles of due process that protect each individual defendant from state court overreaching.

The rule adopted by the New Jersey Supreme Court would, in all practical reality, allow New Jersey to assert jurisdiction over a company from any nation whose products are sold somewhere in the United States. Not only is this unreasonable under the "great care" urged by the *Asahi* majority, it goes well beyond the "traditional notions of fair play and substantial justice" that allow jurisdiction over an "absent," or foreign, defendant "only with respect to

suits arising out of the absent defendant's contacts with the State." *Burnham*, 495 U.S. at 609–10 (quoting *Int'l Shoe*, 326 U.S. at 316).

CONCLUSION

For the reasons set forth above, and in the Brief for Petitioner, the decision below should be reversed.

Respectfully submitted.

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